1993

STEVEN MARK HANSEN, Plaintiff and Respondent, -vs- TONY DONNELLY, Defendant and Appellant : Reply Brief

Utah Court of Appeals

Thomas Blonquist; Attorney for Plaintiff.
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IN THE UTAH COURT OF APPEALS

STEVEN MARK HANSEN,

Plaintiff/Respondent,

-vs-

TONY DONNELLY,

Defendant/Appellant.

REPLY BRIEF

Lower Court Civil No. 920902292
Case No. 93 0121 CA

Priority Classification [redacted]

Priority No. 15

REPLY BRIEF OF APPELLANT

AN APPEAL FROM THE FINAL JUDGMENTS AND ORDERS OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, UTAH, THE HONORABLE FRANK G. NOEL, DISTRICT COURT JUDGE PRESIDING

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CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES

There are no constitutional provisions, statutes, cases, or other authorities cited by defendant in this brief, or thought by defendant to be dispositive of the issues in this appeal. Also such authorities are referenced in defendant's opening brief herein.

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-vs-

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Priority Classification 14b

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DISTRICT COURT JUDGE PRESIDING

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TABLE OF AUTHORITIES

Cases

None.

Statutes

None.

Rules

None.

IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

COMES NOW THE DEFENDANT/APPELLANT (hereinafter "defendant") and submits the following as his Reply Brief in the above-captioned case:

SUMMARY OF ARGUMENT

1. The plaintiff's brief misrepresents the nature of the court orders appealed from.

2. Plaintiff failed to meet his burden of proof by failing to establish through clear and convincing evidence that defendant was in contempt of court.

3. The court's order was too ambiguous to be enforceable.

ARGUMENT

POINT I: PLAINTIFF MISREPRESENTS THE ORDER OF THE TRIAL COURT.

Plaintiff makes much in his Brief of Appellee of the issue of defendant's physical distance from plaintiff on May 25, 1992, and June 21 and 22, 1992. To the extent that plaintiff is attempting to represent that defendant's physical proximity to plaintiff was at all relevant, this is a mischaracterization of the lower court's orders.

The trial court did enjoin defendant from being within 200 feet of the "premises where the Plaintiff may reside or be employed." It also enjoined defendant from being "within 50 feet of the Plaintiff . . . " However, all these restrictions were contained within the April 23, 1992, Temporary Restraining Order. That order expired, by its own terms, ten days later, on May 3, 1992. Thereafter, by its own language, that order became void.

Plaintiff reports that the trial court admonished defendant at the hearing on May 1, 1992, to keep a certain distance from the plaintiff. This assertion is not supported by the record. The court specifically declined to restrict defendant to keep a set distance from plaintiff, while defendant was at or in his own home. The court specifically stated, at the hearing when defendant was found in contempt:

> And the request was made that I limit Mr. Donnelly so that he could not be within 50

> feet of Mr. Hansen when he came to pick up his child. And the request was made, Judge, if you do that, it's going to require that he go out and stand in the back corner of his lot somewhere if you impose that kind of restriction. And so the Court decided not to impose that restriction, but just order that he act reasonably. (R. 211, ll.23-212, l.5) (emphasis added)

Most importantly, plaintiff's characterization of the oral ruling is in direct contradiction to the language of the lower court's order entered June 5, 1992. The language of that order (which is the order defendant allegedly violated in May and June, 1992) says absolutely nothing about defendant keeping a set distance from plaintiff or his property. This order was drafted by plaintiff's own counsel. Certainly, if the court had really ordered defendant to keep a set distance away from plaintiff, plaintiff's own counsel would have reflected that in the written order he prepared.

Thus, plaintiff's assertion in his Brief of Appellee that defendant violated the June 5, 1992 order, solely by standing eighteen inches to two feet from defendant, is not valid. After the first restraining order expired on May 3, 1992, it simply did not matter how close defendant stood to plaintiff.

Everything else plaintiff complained of at trial was of a highly subjective nature. For example, plaintiff complained in his testimony (and in his brief) that defendant "glared" or "stared" at plaintiff, or threatened plaintiff by "body language." Given

plaintiff's clear hostility toward defendant, his interpretation that defendant "glared" rather than just "looked" at plaintiff, or that his "body language" was "threatening," is not credible. His testimony on this point is not adequate to sustain plaintiff's burden of proof to support his claim of contempt by clear and convincing evidence.

POINT II: THE LOWER COURT'S ORDER WAS AMBIGUOUS.

Plaintiff does not address in his Brief of Appellee the issue of the ambiguity of the June 5, 1992 order. The order to "act reasonably" was too ambiguous to be enforceable in a contempt action.

Plaintiff's brief supports defendant's claim that the order to "act reasonably" is too subjective to be enforceable. Plaintiff quotes the judge's own comment made at trial when the judge found defendant in contempt. The court stated:

> I'm going to find that the defendant is in contempt of this Court's orders now, and admittedly, Paragraph 2, plaintiff and defendant are ordered to act reasonably in the presence of each other. That may be a subjective determination. (R. 214) (emphasis added)

The court goes on to decline to order a jail sentence for defendant, based upon lack of notice given by the earlier court order.

As pointed out in plaintiff's own brief, the court felt the order was open to subjective interpretation. The court itself

found the notice to defendant, of what was required of him, to be so inadequate that a jail sentence could not be justified.

For the very reason a jail term was improper, a finding of contempt was also improper.

CONCLUSION

The trial court could not find, as a matter of law, that defendant had knowledge of the specific duty imposed upon him by the trial court, or the ability to comply with the order. Therefore, as a matter of law, the trial court could not find defendant in contempt.

Since the court below could not find defendant to be in contempt, the court could not fine defendant $100.00 for contempt, nor assess defendant $1,000.00, for plaintiff's attorney's fee, as an additional sanction for contempt.

The case should be remanded for reversal of the order of contempt, and of the order for sanctions, including the fine and attorney's fees.

RESPECTFULLY SUBMITTED this _____ day of April, 1993.

CORPORON & WILLIAMS

_____

MARY C. CORPORON
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the defendant/appellant herein, and that I caused the foregoing REPLY BRIEF to be served upon plaintiff/respondent by placing two true and correct copies of the same in an envelope addressed to:

THOMAS BLONQUIST
Attorney for Plaintiff/Respondent
40 South 600 East
Salt Lake City, Utah 84102

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the _____ day of _____, 1993.

_____

Secretary